No. 83-767

In the Supreme Court of the United States

OCTOBER TERM, 1983

EL PASO TIMES, INC., ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
STEPHEN S. TROTT
Assistant Attorney General
BRENDA GRUSS
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether two restrictions imposed by the district court on post-verdict interviews with jurors, which prohibit repeated requests for interviews and inquiry into specific votes of other jurors, violate the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Miscellaneous: Page

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-767

EL PASO TIMES, INC., ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 713 F.2d 1114.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1983. The petition for a writ of certiorari was filed on November 5, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

STATEMENT

Following a lengthy and highly publicized trial, a jury found four defendants guilty of various crimes in connection with the contract-murder of a federal judge.

[1] Petitioners seek to invoke (Pet. 2) the jurisdiction of the Court under 28 U.S.C. 1257(3), but that provision applies to review of state court judgments and is clearly inapplicable here.

Subsequently, the district court entered an order imposing specific restrictions on post-verdict interviews with the jurors. The court of appeals affirmed and denied a petition for a writ of mandamus (Pet. App. 1a-8a).

On December 14, 1982, a jury in the United States District Court for the Western District of Texas found Charles V. Harrelson, Joseph Chagra, Elizabeth Chagra, and Jo Ann Harrelson guilty of various acts and conspiracies involved in the murder of United States District Judge John H. Wood, Jr. As the district court discharged the jurors, it invoked Local Court Rule 500-2 and prohibited any person, including representatives of the press, from talking with any juror, or the juror's relatives, friends, or associates, concerning the jury's deliberation and verdict, except with leave of court granted upon good cause shown.[2] Pet. App. 2a.

In response to the district court's order, petitioners filed a Motion of Non-Parties to Interview Jurors. Petitioners stated that they wished to interview the discharged jurors "without restriction of any sort whatsoever," and they argued that the district court's invocation of Rule 500-2 was an unconstitutional restraint on freedom of speech and of the press. On December 21, 1982, the district court denied petitioners' motion. Petitioners then filed an application for a writ of mandamus, which was denied by the Fifth Circuit. Pet. App. 2a-3a.

---

[2] Rule 500-2 provides (Pet. App. 2a):

> No * * * attorney or any party to an action or any other * * * person shall himself or through any investigator or other person acting for him interview, examine or question any juror, relative, friend or associate thereof either during the pendency of the trial or with respect to the deliberations or verdict of the jury in any action, except on leave of court granted upon good cause shown.

On December 30, 1982, the Fifth Circuit held Rule 500-2 unconstitutional as applied in an unrelated criminal case. *In re Express-News Corp.*, 695 F.2d 807. In response to the *Express-News* decision, petitioners moved the district court to vacate its prior order enforcing the Rule. The district court denied petitioners' motion on the ground that the *Express-News* decision was not yet final because the mandate had not issued. Noting that *Express-News* had invalidated the Rule as applied and that a trial judge retained "considerable latitude in applying Rule 500-2," the district court indicated that it would take "appropriate action" in the present case when the mandate issued in *Express-News*. On January 11, 1983, petitioners requested the court of appeals to reconsider its denial of their application for writ of mandamus. This request was denied on January 19. Pet. App. 3a.

On January 21, 1983, after the mandate in *Express-News* had issued, petitioners filed with the district court a Motion to Vacate Restrictions on Interviews of Discharged Jurors. On January 26, the district court granted petitioners' motion, subject to four restrictions upon proposed interviews with the discharged jurors. Insofar as relevant here, the court's order provided the following (Pet. App. 3a-4a):

> No person may make repeated requests for interviews or questioning after a juror has expressed his or her desire not to be interviewed.
>
> No interviewer may inquire into the specific vote of any juror other than the juror being interviewed.

Thereafter, petitioners sought review of these two provisions of the district court's January 26 order by way of both appeal and mandamus. The Fifth Circuit affirmed the order on appeal and denied mandamus. Relying on its recent decision in *Express-News*, the

court of appeals observed that "the First Amendment right to gather news is neither absolute nor does it provide journalists with special privileges denied other citizens * * *. [R]estrictions upon it are permissible * * * to prevent a substantial threat to the administration of justice * * * [, including a threat to the right of] jurors, even after completing their service, * * * to privacy and to protection against harassment" (Pet. App. 4a-5a). Finding that "repeated importunings of [a juror] who has declined to be interviewed [would constitute] harassment and an invasion of his privacy" (*id.* at 7a), the court of appeals upheld the district court's conclusion "that one request made after a known refusal [by the juror] to be interviewed was enough to allow and that more—repeated requests—were too many. * * * The court's order does no more than forbid nagging [a juror] into [consenting to be interviewed]" (*ibid.*). The court of appeals also sustained the limitation on inquiries to an interviewed juror about the specific votes of other jurors, concluding that this provision was "'narrowly tailored to prevent the disclosure of the ballots of individual jurors'" (*id.* at 8a (citation omitted)) and served to protect against inhibition of the jury's "'[f]reedom of debate * * * and independence of thought'" (*ibid.* (citation omitted)). Finally, the court of appeals held that the district court's order was not vague (*id.* at 7a) or procedurally invalid because of the absence of an evidentiary hearing or formal findings of fact (*id.* at 5a-6a).

ARGUMENT

Petitioners contend that the First Amendment bars the district court's efforts in this case—a highly publicized prosecution against notorious defendants in connection with the murder of a federal judge—to protect the privacy of the jurors and the integrity of the jury process. The courts below correctly rejected this contention. Moreover, as petitioners acknowledge (Pet. 6),

this issue is one of first impression. In these circumstances, further review is not warranted.

At the outset we emphasize what is not involved here. The district court's order does not restrain the ability of the press to publish whatever it chooses—whether factual information or editorial opinions—about this case or the federal criminal justice system in general. The order did not limit the access of the press to the trial proceedings that occurred and does not limit access to the evidentiary record. It does not discriminate between the press and the general public. Nor does it bar jurors from speaking to the press voluntarily on any and all subjects. And the order does not restrict the press from making a request to each juror for an interview. Against this background the reasonable conditions that the order does impose—that repeated requests for interviews not be made to unwilling jurors and that inquiries not be made during a juror interview into the specific votes of other jurors—do not violate the First Amendment.

As the court of appeals explained, the district court's order serves to ensure jurors' privacy and protect them from harassment (Pet. App. 7a) and to safeguard the jury's independence and freedom of debate (*id.* at 8a). In the circumstances presented here, the order was "necessitated by * * * compelling governmental interest[s], and is narrowly tailored to serve th[ose] interest[s]." *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 606-607 (1982). See also *Press-Enterprise Co.* v. *Superior Court*, No. 82-556 (Jan. 18, 1984), slip op. 8.

1. The law traditionally has guarded the privacy of jurors' deliberations. See *Clark* v. *United States*, 289 U.S. 1 (1933). This protection shields the deliberative process from external influences (*United States* v. *Gurney*, 558 F.2d 1202, 1211 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978)); encourages frank and open discussions in the jury room (*McDonald* v. *Pless*, 238 U.S. 264, 268 (1915)); and maintains the integrity of

the jury system (*United States* v. *Gurney*, 558 F.2d at 1210). As this Court has explained, "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Clark* v. *United States*, 289 U.S. at 12-13.

The confidentiality and frankness of jurors' deliberations are preserved by ensuring that jurors enjoy privacy and protection against harassment even after termination of their service. *Stein* v. *New York*, 346 U.S. 156, 178 (1953); *Express-News*, 695 F.2d at 810; *United States* v. *Gurney*, 558 F.2d at 1210 & n.12; *Bryson* v. *United States*, 238 F.2d 657, 665 (9th Cir. 1956), cert. denied, 355 U.S. 817 (1957); see also *Press-Enterprise Co.* v. *Superior Court*, slip op. 3 (Blackmun, J., concurring). For example, jurors have been protected from inquiry in cases in which a party has sought information to impeach the verdict. See, *e.g.*, *United States* v. *Riley*, 544 F.2d 237, 242 (5th Cir. 1976), cert. denied, 430 U.S. 932 (1977); *United States* v. *Franks*, 511 F.2d 25, 38 (6th Cir. 1975); *Miller* v. *United States*, 403 F.2d 77 (2d Cir. 1968).

In order to protect the integrity of jury deliberations, it is equally necessary to maintain the privacy of the deliberative process and insulate jurors from harassment in cases, such as the instant one, in which the media seek to obtain and disseminate information about the deliberations and verdict. Individuals exercising the grave responsibility of serving as jurors may be inhibited from freely and fairly discharging their duties by the prospect of post-trial media scrutiny and publication of their thoughts and actions. This threat to the confidentiality of jury deliberations poses a danger to the integrity of the criminal justice system. As the Fifth Circuit stated in denying press access to notes between a jury and trial judge:

> Compelling governmental interest in the integrity of jury deliberation requires that the privacy of

> such deliberations and communications dealing with them be preserved. Confidentiality is a shield against external considerations entering into the deliberative process. Such a shield prevents undermining of the integrity of the jury system. Juries must be permitted to deliberate fully and freely, unhampered by the pressures and extraneous influences which could result from access by the press to the deliberative process.

United States v. *Gurney*, 558 F.2d at 1210-1211.[3]

The primary responsibility for guarding the integrity of the jury process rests with the district court. In exercising this responsibility the court draws upon broad powers to ensure the orderly and expeditious

---

[3] The importance of protecting juror privacy and maintaining the integrity of the jury process is also supported by Fed. R. Evid. 606 and 18 U.S.C. 1508. Rule 606(b) addresses inquiries into the validity of a jury verdict. The Advisory Committee Notes on the Rule explain that the "values sought to be promoted by excluding * * * evidence [from jurors] include freedom of deliberation * * * and protection of jurors against annoyance and embarrassment." The Senate Report likewise noted the need to protect against "the harassment of former jurors" and to preserve "absolute privacy * * * for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation." S. Rep. 93-1277, 93d Cong., 2d Sess. 14 (1974). The Senate version of the Rule was adopted in Conference and enacted into law. See H.R. Conf. Rep. 93-1597, 93d Cong., 2d Sess. 8 (1974).

The objective of safeguarding the jury process, even when disclosure is sought for informational rather than litigation purposes, is further underscored by 18 U.S.C. 1508, which makes it illegal to record, listen to, or observe a jury's deliberations or votes. Section 1508 was enacted in reaction to a research study by law professors pursuant to a foundation grant in which the deliberations of federal juries were recorded. As the House Report stated,"[t]he secrecy of jury deliberations * * * should be protected at all times and under all circumstances." H.R. Rep. 2807, 84th Cong., 2d Sess. 2 (1956).

progress of a trial (*Bitter* v. *United States*, 389 U.S. 15, 16 (1967)) and to protect the administration of justice from "abuses, oppression and injustice." *Gumble* v. *Pitkin*, 124 U.S. 131, 144 (1888). These powers accord wide latitude to the court both in ordering day-to-day trial activities (*Columbia Broadcasting System, Inc.* v. *Young*, 522 F.2d 234, 241 (6th Cir. 1975)) and in entering post-trial orders to preserve the integrity of the judicial process. See *Wheeler* v. *United States*, 640 F.2d 1116, 1123 (9th Cir. 1981); *King* v. *United States*, 576 F.2d 432, 439 (2d Cir.), cert. denied, 439 U.S. 850 (1978); *United States* v. *Brasco*, 516 F.2d 816, 819 n.4 (2d Cir.), cert. denied, 423 U.S. 860 (1975); *United States* v. *Franks*, 511 F.2d at 38; *Miller* v. *United States*, *supra*; *Bryson* v. *United States*, 238 F.2d at 665.

The district court's order in this case was entered in the exercise of these broad powers to protect the administration of justice. The order maintains the sanctity of jury deliberations in this widely publicized case and protects the jurors from harassment and invasions of privacy following their jury service. These interests adequately justify the limited restrictions imposed in the district court's post-trial order.

2. The district court's order is narrowly tailored to achieve its objectives. At the outset, we note that its application is limited to this case and reflects the circumstances of this highly publicized prosecution for the contract-murder of a federal judge. Thus, no question is presented here of a generally applicable restriction on press access.

The limitation in the order on requests for juror interviews is precisely drawn. It does not apply broadly to jurors who are willing to be interviewed as well as those who are not; rather, it allows willing jurors to agree to interviews while protecting unwilling jurors from the harassment of repeated requests. Moreover, it

does not bar all press contacts even with unwilling jurors, but instead allows the press to make contact with each juror; thus it clearly and specifically indicates what constitutes impermissible harassment of jurors. Nor does the order seek to regulate the manner in which interview requests are made or assume that press contacts will be discourteous or disagreeable.

Likewise, the limitation on inquiries to a juror concerning the specific votes of other jurors is also carefully drafted. It permits inquiries into the juror's own vote and allows him to discuss his vote if he wishes to do so. Its prohibition focuses specifically on the votes of other jurors and does not proscribe inquiry into other matters involving the jury's deliberations. And it does not preclude a juror from voluntarily disclosing on his own initiative the votes of other jurors. Rather, by preventing an interviewer from affirmatively questioning and probing on the issue of other jurors' votes, this provision in the order simply enhances the prospect that each individual juror will be allowed to decide, in view of his particular circumstances and sensibilities, whether his vote should be made public.[4]

---

[4] As noted above, the district court's order does not bar jurors from disclosing, on their own, the votes of other jurors. Compare *Express-News*, 695 F.2d at 810, 811 ("[S]pecific questions about other jurors' votes * * * might, under at least some circumstances, be inappropriate. * * * We express no view concerning the validity of a rule narrowly tailored to prevent the disclosure of the ballots of individual jurors or some other paramount value"). As the court of appeals correctly recognized (Pet. App. 5a), the fact that the district court did not attempt to go as far as it might have does not raise doubts about the validity of the order it did enter.

We also point out that the order in this case falls far short of the limitations applicable to grand jurors, which are designed to further, among other things, free and frank deliberations by the grand jury. See *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 219 n.10 (1979); *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 681-682 n.6 (1958). Fed. R. Crim. P. 6(e)(2),

Finally, petitioners' contention (Pet. 21-24) that the order is unconstitutionally vague is insubstantial. The order speaks in plain and intelligible terms and gives "fair notice of what conduct is prohibited" (Pet. App. 7a). That petitioners can conceive of hypothetical situations that might call for an interpretation of the order does not mean that the order is vague but only that it cannot be mechanically applied or expressed with mathematical exactness.[5]

3. The decision of the Fifth Circuit in this case does not, as petitioners suggest (Pet. 6-7), conflict with the Ninth Circuit's decision in *United States* v. *Sherman*, 581 F.2d 1358 (1978), or with the Fifth Circuit's own

---

which codifies grand jurors' historic secrecy oath (see Fed. R. Crim. P. 6(e) advisory committee note), prohibits grand jurors from disclosing matters occurring before a grand jury except with leave of court. The rule thus protects "the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like." *Securities and Exchange Commission* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1382 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980). The district court's order here is much narrower and less restrictive than the traditional limitations on information that grand jurors may disclose.

[5] For example, petitioners particularly complain (Pet. 21-22) that uncertainty is caused by the use of the phrase "no person" in the provision prohibiting repeated interview requests and the phrase "no interviewer" in the provision proscribing inquiries into the specific votes of other jurors. The reason for this distinction is self-evident. The limitation on interviewer requests applies to anyone who could seek to interview a juror and thus reads in terms of "no person"; in contrast, the limitation on inquiries concerning other jurors' votes can apply only to those who are engaged in the process of trying to obtain substantive information, *i.e.*, an interview, and therefore is framed in terms of "no interviewer." We do not see how the language in these provisions could confuse petitioners or "chill" them in the exercise of their First Amendment rights.

decision in the earlier case of *In re Express-News Corp., supra.*[6]

In *Sherman*, the court of appeals invalidated a post-trial order of the district court that prohibited the news media from contacting and interviewing jurors. Noting, in particular, that individual jurors "may not regard media interviews as harassing" (581 F.2d at 1361), the court of appeals held that "[t]he district court's order, by depriving the media of the opportunity to ask the jurors if they wished to be interviewed, was clearly erroneous as a matter of law" (581 F.2d at 1362).

In *Express-News*, the court of appeals struck down the application of a district court rule that prohibited any person, without leave of court, from interviewing any juror concerning the jury's deliberations or vote. Relying on the Ninth Circuit's decision in *Sherman*, the Fifth Circuit found that the First Amendment had been violated (695 F.2d at 810):

> The rule is unlimited in time and in scope, applying equally to jurors willing and anxious to speak and to jurors desiring privacy, forbidding both courteous as well as uncivil communications, and foreclosing questions about a juror's general reactions as well as specific questions about other jurors' votes * * *.

In invalidating the "categorical denial of all access" (695 F.2d at 811), however, the court noted that "there are contervailing considerations that, under the proper circumstances, outweigh * * * first amendment rights * * * [, including the entitlement of] jurors, even after completing their duty, * * * to privacy and to protection against harassment" (695 F.2d at 809-810).

The decision below is fully consistent with *Sherman* and *Express-News*. Unlike *Sherman*, the order in this

---

[6] An intra-circuit conflict does not, of course, warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

case does not prohibit all contact by the press with jurors; rather, it allows the press to make a request for an interview with each juror and leaves it to the individual juror to agree or decline to be interviewed.[7] Likewise, there is no conflict between this case and *Express-News*, since the order here does not extend beyond the instant prosecution, does not prevent jurors from willingly speaking with the press, and does not foreclose inquiries or discussion about the interviewed juror's vote or the jury's general deliberations and reactions. The order in this case, in contrast to those in *Sherman* and *Express-News*, is supported by the compelling governmental interests in the integrity of the jury process and the privacy of jurors and is not overbroad in relation to those objectives.

4. Contrary to petitioners' contention (Pet. 16), the order below did not issue "*sua sponte* in the absence of any record." As the procedural history of this case demonstrates (see pages 2-4, *supra*), the order now under challenge modifies a previous order that, after three motions by petitioners as well as two petitions for mandamus to the court of appeals, was altered to conform to the *Express-News* decision. Petitioners had notice of the court's intention to promulgate the order, and they had ample opportunity both to present their arguments to the court and to rebut the justifications advanced by the government in support of the order. Compare *United States* v. *Schiavo*, 504 F.2d 1, 14 (3d Cir.), cert. denied, 419 U.S. 1096 (1974) (inadequate notice to media representatives, and unduly brief hearing). The district court's modification of its initial order in response to petitioners' motions demonstrates that the court

---

[7] Furthermore, in *Wheeler* v. *United States*, *supra*, the Ninth Circuit recognized, as the court below held, that the "trial court's inherent power to protect the sound administration of justice has provided the basis for orders issued to protect jurors after the trial was ended" (640 F.2d at 1123).

neither adhered inflexibly to its own point of view nor uncritically accepted the government's representations. Compare *Rogers* v. *United States Steel Corp.*, 536 F.2d 1001, 1008 (3d Cir. 1976) (district court accepted one party's contention that information subject to nondisclosure order was privileged). And the district court's observation that the original order would be modified in light of *Express-News* to be "narrowly tailored to prevent the disclosure of the ballots of individual jurors or some other paramount value" (Order of Jan. 26, 1983, at 5) shows the court's recognition that the limitations imposed must be carefully drawn and serve compelling objectives. Compare *In re Halkin*, 598 F.2d 176, 197 (D.C. Cir. 1979) (parties made no showing that the potential harm could be avoided by less restrictive means).

Nor is the order procedurally invalid because the district court did not conduct an evidentiary hearing and make formal findings of fact. A district court's decisions regarding access to information about jury deliberations is "an integral part of trial management. The efficient administration of the trial courts would be significantly impaired should we require hearings and special orders for each such decision." *United States* v. *Gurney*, 558 F.2d at 1211 n.15. Thus, "[w]hether or not testimony need be taken depends * * * on the existence and nature of any factual disputes affecting First Amendment values." *United States* v. *Schiavo*, 504 F.2d at 14 (Adams, J., concurring). As the court below explained (Pet. App. 6a (citations omitted)):

> The trial of Judge Wood's assassins was as widely followed and publicized a one as could well be imagined. No hearing was required to ascertain this, nor was one requisite to a determination that reporters are persistent and tenacious in pursuing information and that they seek it regarding the nonpublic portions of legal proceedings * * * as well as the public ones * * *. These are truisms known

> to all, and if they form a sufficient basis for the court's order, it is not invalid merely because he held no unnecessary hearing and wrote no redundant findings of fact concerning them before handing it down.

In the circumstances of this case, a hearing and formal findings would have reflected only what was already evident and would simply have duplicated the written submissions that had been made. Compare *Press-Enterprise Co.* v. *Superior Court*, slip op. 9, 11 (findings were necessary to determine whether closure of voir dire was in fact warranted by the interests asserted).[8]

---

[8] We are aware of no case, and petitioners have cited none, in which a reviewing court has overturned an order restricting media access simply because of a lack of findings even though, as here, adequate reasons supporting the order were apparent and no less restrictive alternative was evident. See *Press-Enterprise Co.* v. *Superior Court*, *supra* (order closing to the public all but three days of six-week voir dire, and denying press access to transcript, invalid because no basis existed to withhold most of the information and there were alternatives to the sweeping restraint of complete closure and total suppression); *United States* v. *McKenzie*, 697 F.2d 1225, 1227 (5th Cir. 1983) (injunction against showing "60 Minutes" was not geographically and temporally limited to protecting fairness of trial in Dallas, and district court failed to consider the adequacy of a continuance or change of venue to avert prejudice); *In re Halkin*, *supra* (order limiting dissemination of information contained in non-public discovery materials had no basis in perceived concern about fairness of trial, and district court had examined only a portion of the documents in question); *Rogers* v. *United States Steel Corp.*, *supra* (order prohibiting dissemination of document obtained independently of discovery overturned because no threat to the administration of justice existed); *Chase* v. *Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970) (orders limiting attorney's public speech could not be based on threat to fair trial from seven-month-old newspaper articles or the fact that attorney's associate made inflammatory public statements in connection with a trial in another jurisdiction); cf.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
STEPHEN S. TROTT
Assistant Attorney General
BRENDA GRUSS
Attorney

JANUARY 1984

Gulf Oil Co. v. *Bernard*, 452 U.S. 89, 102-103 (1981) (order limiting communications by parties and attorneys with class members invalid because the district court's "sweeping restraint order * * * [was] adopted *in toto* [from] the order suggested by the Manual for Complex Litigation—on the apparent assumption that no particularized weighing of the circumstances of the case was necessary").